

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, INDIVIDUALLY, and ELLSWORTH WOOD as Executor of the Estate of ELAINE SHIPP, Deceased,

Appellees.

APPELLEES' BRIEF.

WATERS, ARDITTO AND WATERS,
621 Roosevelt Building, Los Angeles 14,
Attorneys for Appellees.

FILED
DEC 1 1948

PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	PAGE
Foreword	1
Statement	2
Question presented	4
Summary of argument.....	5
Argument	6
I.	
In proceedings for divorce, under the laws of California, State Court has jurisdiction to hear and determine the property rights of the litigating spouses.....	6
II.	
State Court necessarily assumed control of the subject matter of this action.....	9
III.	
Where a State Court holds prior actual or constructive possession of property in an in rem or quasi in rem proceeding, a Federal District Court has no jurisdiction to hear and determine a controversy, involving possessory rights in the same res, the effective disposition of which by the Federal Court would result in interference with the administration of the res by the State Court.....	11
IV.	
District Court did not and was not required to disregard appellant's corporate entity to support its judgment of dismissal	14
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boston Acme Mines Corp. v. Salina Canyon Coal Co., 3 F. 2d 729	10, 13
Commonwealth Trust Co. v. Bradford, 297 U. S. 613.....	12
Huber v. Huber, 27 Cal. 2d 784, 167 P. 2d 708.....	6, 11
Pauls v. Powers, 2 Cal. 2d 590, 42 P. 2d 75.....	11
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U. S. 189	10, 12
Princess Lida v. Thompson, 305 U. S. 456.....	12, 13, 15
Spahn v. Spahn, 70 Cal. App. 2d 791, 162 P. 2d 53.....	6, 11
Title Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356....	11
United States v. Bank of New York & Trust Co., 296 U. S. 463	10, 12, 13

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, INDIVIDUALLY, and ELLSWORTH WOOD as Executor of the Estate of ELAINE SHIPP, Deceased,

Appellees.

REPLY BRIEF OF APPELLEES.

Foreword.

Elaine Shipp (one of the original defendants herein) died on July 27, 1948, and by stipulation of the parties hereto this Court, on November 3, 1948, ordered that Ellsworth Wood, in his capacity as Executor of the Estate of Elaine Shipp, Deceased, be substituted as an appellee herein in the place and stead of said Elaine Shipp.

Upon the death of Elaine Shipp on July 27, 1948, her life interest in the Cadillac automobile, in question herein, terminated and the only party (other than appellant and Everett S. Shipp) presently interested in this litigation is Ellsworth Wood—in his *individual* capacity [R. 6].

The Estate of *Elaine Shipp, Deceased*, has no claim to or interest in the subject matter of this appeal.

Ellsworth Wood, *individually*, is, in effect, the only appellee herein and he claims his interest because Elaine Shipp gave him the automobile subject to her life interest [R. 6]. Ellsworth Wood was, at all times pertinent herein, and now is a resident of Portland, Oregon, and appellant is incorporated in the State of Delaware. Elaine Shipp was a resident of the County of Los Angeles, State of California. Ellsworth Wood was not served in the Southern District of California.

Other than to point out the above facts we have no statement to make in regard to the jurisdictional references contained in appellant's opening brief.

Statement.

The record [R. 12, 17-19] discloses that Everett S. Shipp filed a complaint for divorce against Elaine Shipp (now deceased) on March 4, 1948, in the Superior Court of the State of California, in and for the County of Los Angeles (hereinafter called State Court). That on March 8, 1948, Elaine Shipp filed an answer and cross-complaint to that complaint [R. 12, 20-26] and on June 4, 1948, she filed an amended answer and an amended cross-complaint to such complaint [R. 56, 59-78]. The answers and cross-complaints *raised an issue, inter alia, as to the ownership of the Cadillac automobile in question herein* [R. 22, 65, 77], *and as to Everett S. Shipp's interest in the appellant herein* [R. 22, 60, 62, 63, 64, 65, 70, 72, 73, 74, 75].

On March 9, 1948, State Court enjoined Everett S. Shipp from interfering with Elaine Shipp's use of the Cadillac automobile [R. 27].

On April 14, 1948 (41 days *after* State Court action instituted) appellant filed an action in the District Court of the United States for the Southern District of California, Central Division (hereinafter called District Court) against Elaine Shipp and Ellsworth Wood for recovery of this automobile—the title to and right to possession of which was already placed in issue by State Court action [R. 2-4].

On May 4, 1948, Elaine Shipp and Ellsworth Wood filed their answers in District Court [R. 5-9]. These answers set up a life interest in the automobile in Elaine Shipp and a remainder interest in Ellsworth Wood [R. 6-7].

On May 17, 1948, appellee filed a Notice of Motion to Dismiss action with District Court [R. 9-11]. The motion, in brief, was based upon the theory that State Court had first acquired jurisdiction over and constructive possession of the Cadillac automobile and that the issue in both actions ((*i. e.*) District Court and State Court) was the same (*i. e.*) who was the owner of the automobile (*i. e.*) Elaine or Everett S. Shipp (through his alter ego—appellant herein) and, therefore, District Court did not have jurisdiction over the litigation [R. 10-16].

On June 1, 1948, appellant filed a statement of Reasons and Opposition to Defendant's Motion to Remand Cause to Superior Court [R. 40-52].

Everett S. Shipp's interest in appellant and other related corporations are set forth in Exhibit E of the affidavit in Support of Motion to Dismiss [R. 39] and in the Supplemental Affidavit in support of that motion [R. 57-58]. These affidavits disclose that Everett S. Shipp owns about 81% of appellant's stock.

The circumstances surrounding the commencement of this action in District Court and Everett S. Shipp's participation therein are disclosed by Mr. Shipp's deposition [R. 13-15] and the affidavits of appellee's attorney [R. 16, 58].

On June 7, 1948, the matter was argued in District Court [R. 85-98] and on June 17, 1947, an order of dismissal was made [R. 78-81] on the ground District Court lacked jurisdiction of the subject matter of the action. A judgment of Dismissal was entered June 23, 1948 [R. 81]. The present appeal was then timely filed.

Question Presented.

Did the District Court err in deciding that State Court held prior constructive possession of the Cadillac automobile in a *quasi in rem* proceeding and therefore, the District Court did not have jurisdiction to hear and determine a controversy involving possessory rights in the same automobile where the effective disposition of the such action would result in interference with the administration of the *res* by State Court?

Summary of Argument.

In California Courts title to separate or community property of the spouses can be quieted in a divorce action if the pleadings raise that issue. The pleadings in State Court did raise that issue in this case.

The pleadings in State Court also raised an issue in regard to appellant's status and interest in the subject matter of this action.

State Court necessarily assumed control of the subject matter of this action *in the quasi in rem* proceeding commenced in that Court about forty days prior to the commencement of another *in rem* proceeding in District Court involving possessory rights to the same *res and affecting the same parties*.

District Court does not have jurisdiction to hear and determine an issue involving possessory rights in the same *res* which is the subject matter of a prior *in rem* action in State Court where the issues are the same and the same parties would be affected by a judgment of either Court.

District Court was not required to nor did it disregard the alleged separate corporate entity of appellant.

ARGUMENT.

I.

In Proceedings for Divorce, Under the Laws of California, State Court Has Jurisdiction to Hear and Determine the Property Rights of the Litigating Spouses.

It is well settled that California Courts have the power, when the issue is presented by the pleadings in a divorce action, to hear and determine the property rights of husband and wife and to quiet title (to the separate and community property) in the rightful owner.

In *Huber v. Huber*, 27 Cal. 2d 784, 793, 167 P. 2d 708, the Court said:

“* * * While the court in a divorce action should not ‘assign the *separate* property of one of the spouses to the other’ * * * yet when the issue has been made the court may determine whether the property is separate or community and *quiet title in the rightful owner*. *Salveter v. Salveter*, 206 Cal. 657 (275 Pac. 801); *Allen v. Allen*, 159 Cal. 197 (113 Pac. 160); *Spahn v. Spahn*, 70 Cal. App. 2nd, 791 (162 Pac. (2nd) 53); Here the pleadings put in issue the status of the property and the rights of the parties therein both separate and community.” (Emphasis added.)

In *Spahn v. Spahn*, 70 Cal. App. 2d 791, 796, 797, 162 P. 2d 53, the Court said:

“In the case of *Callnon v. Callnon*, 7 Cal. App. 2d 676, 670, (46 P. 2d 988), cited by both parties, the court held: ‘Where the property rights are put in issue in a divorce proceeding, *either by specific allegations describing such property*, or by allegation that

no community property existed, the decree is *res judicata* of such rights.' In the same case at page 681 the rule is stated as follows: 'It may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or *which is the separate property of the spouses*. This jurisdiction is found in sections 141 *et seq.* of the Civil Code, which authorize the division of the community property and a lien upon the separate property of the husband in aid of the enforcement of remedial orders made in the proceeding.' (Italics added.)

"The rule which seems applicable in the present situation is explicitly stated in 27 Corpus Juris Secundum, page 1141:

" 'Where a party to a divorce invokes the action of the trial court in the determination of property rights, as by submitting the pleadings and proof, such party cannot complain on appeal that the court has no authority to determine those rights.'

"The above rule finds support in the California cases. In *Allen v. Allen*, 159 Cal. 197, 201 (113 P. 160) it was said:

" 'But the superior court in which the action for divorce must be brought is also invested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of property held by them—*whether separate or community*—an issue in the proceeding, as the court is vested with jurisdiction to *determine that question as fully as if the title were put in issue in a direct action for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought*. While it was not necessary that the question

* * * should have been an issue in the divorce proceeding between these parties they nevertheless did make it such. Neither party objected to doing so, but both invited it.' Likewise in *Marshall v. Marshall*, 138 Cal. App. 706, 707 (33 P. 2d 416), the court said: 'The issue as to the property having been fairly made and by both parties submitted to the court for determination, *the court had jurisdiction to determine the question involved as to the character of the property and to quiet the title of the rightful owner thereto.*' A like holding is found in *Roy v. Roy*, 29 Cal. App. 2d, 596, 603 (85 P. 2d 223)." (Emphasis added.)

The argument of appellant (pp. 7-11) is based upon the erroneous assumption that Mrs. Shipp was claiming (in State Court) that the Cadillac automobile was part of the community property of the spouses and that appellant was not concerned with State Court action. On the contrary the record herein discloses:

- (a) That Elaine Shipp claimed the automobile as her separate property [R. 5, 6, 7, 15, 65, 77] and placed this matter in issue before State Court;
- (b) That Elaine Shipp claimed (and placed in issue before State Court) that appellant herein was one of many mere fictions and devices through which Everett S. Shipp does business [R. 8, 16, 56-59, 62-65, 72-75];
- (c) That Elaine Shipp claimed that appellant was named as owner of the automobile pursuant to an agreement between herself and Everett S. Shipp [R. 5-6, 7-8].

The argument of appellant [R. 7-11] completely ignores the fact that State Court could not have decided the *quasi in rem* proceeding before it without deciding appellant's status in regard to and interest in the Cadillac automobile in question herein. District Court did not have presented, for its consideration, one single issue that had not been previously presented to State Court.

II.

State Court Necessarily Assumed Control of the Subject Matter of This Action.

The amended answer and amended cross-complaint in State Court raised the issue that the Cadillac automobile was the *separate property* of Elaine Shipp [R. 65, 77] after the original answer and cross-complaint alleged the property was community property of the parties [R. 22].

On March 9, State Court enjoined Everett S. Shipp from "interfering with (Elaine Shipp's) her use of the Cadillac" [R. 27].

The State Court could not "quiet title" in Elaine Shipp unless it assumed control of the "thing" to which title was to be "quieted."

Appellant attempts to avoid this obvious principle relied upon by District Court [R. 79] by citing and quoting from three California cases (App. Op. Br. pp. 8-10) which refer to another well established rule to the effect that the pleadings in a divorce action, in California, must frame an issue relating to a third party's claim before the Courts, in such action, will pass on the interest of such party in property claimed by one or both of the spouses.

However, appellant has entirely overlooked appellee's contention that the alleged "third party" (*i. e.* appellant)

is a mere fiction and device through which Everett S. Shipp transacts business [R. 62-65, 72-75].

Those cases cited by appellant deal with interests of disinterested and actual third parties as distinguished from appellant—the actual existence of which was placed in issue by the pleadings in the action in State Court.

In other words the interest of appellant (in the subject matter of this action) was placed in issue before State Court by the allegations relating to disregard of separate entity of appellant herein.

Again appellee points out that District Court did not have presented to it one issue that was not presented to State Court.

In *Boston Acme Mines Corp. v. Salina Canyon Coal Co.*, 3 F. 3d 729, 733, the Court recognized that, in a quiet title action, the Court assumes control and constructive possession of *res* to a sufficient degree to warrant the application of the well established rule that, as between the State and Federal Court, the one which first acquires jurisdiction by possession of the property is vested with power to hear and determine all controversies in respect thereof in an *in rem* Action.

See:

Penn. General Casualty Co. v. Pennsylvania, 294
U. S. 189;

United States v. Bank of N. Y. & Trust Co., 296
U. S. 463.

It is well established in California Courts that an action such as was commenced in State Court herein is, in effect, an action to quiet title and therefore an *in rem* Action.

Huber v. Huber, 27 Cal. 2d 784, 793, 167 P. 2d 708;

Spahn v. Spahn, 70 Cal. App. 2d 791, 797, 796, 162 P. 2d 53;

Pauls v. Powers, 2 Cal. 2d 590, 42 P. 2d 75;

Title Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356.

III.

Where a State Court Holds Prior Actual or Constructive Possession of Property in an *in Rem* or Quasi *in Rem* Proceedings, a Federal District Court Has No Jurisdiction to Hear and Determine a Controversy, Involving Possessory Rights in the Same Res, the Effective Disposition of Which by the Federal Court Would Result in Interference With the Administration of the Res by the State Court.

We believe we have established, by the foregoing pages, the following:

- (a) State Court had prior constructive possession of the subject matter of this action;
- (b) Such possession was in an *in rem* action;
- (c) The action, in District Court, involved possessory rights in the same *res*;
- (d) The effective disposition by Federal Court of such action would interfere with the administration of such *res* by State Court.

It is respectfully submitted that the actions in District Court and State Court presented an identical issue— (*i. e.*) Who was entitled to possession to and title in a Cadillac automobile.

Everett S. Shipp wants the State Court *and* the District Court to concurrently consider this issue.

We believe the following cases support appellees' position that State Court, having first acquired jurisdiction, is the only and proper Court to decide the issue.

Princess Lida v. Thompson, 305 U. S. 456;

U. S. v. Bank of New York & Trust Co., 296 U. S. 463;

Penn. General Casualty Company v. Pennsylvania, 294 U. S. 189;

Commonwealth Trust Co. v. Bradford, 297 U. S. 613.

In *Princess Lida v. Thompson*, 305 U. S. 456, 465, the Court said:

*"The plaintiffs in the District Court were but two of the five cestuis. One of the others has appeared in the Common Pleas proceeding and excepted to the trustees accounts. Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both * * * may proceed * * *. On the other hand, if the two suits are in rem, or quasi in rem, * * * the jurisdiction of*

the one court must yield to the other. We have said that * * * the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, * * *.” (Emphasis added.)

In this present proceeding both the State Court and District Court will be “required to cover the same ground” if this Court fails to sustain District Court. In both Courts, appellee will contend that the Cadillac is his property because Mrs. Shipp gave it to him after the car had been registered in the name of appellant for expense purposes.

It is particularly noted that in the *Princess Lida* case, *supra*, all parties interested were *not* before *both* Courts at the time the motion to dismiss was granted.

Further it is also noted that in the *Boston Acme Mines Corp* case, *supra*, the Circuit Court stressed that in addition to the fact that the parties were different in the two Courts, *the Federal action* presented “issues” that were *not* involved in the State action.

Therefore, we submit that appellant cannot even contend there is any conflict between the *Princess Lida* and *Boston Mine* cases. Of course, in case of conflict the *Princess Lida* case would control.

Along this line we call the Court’s attention to page 479 of *U. S. v. Bank of New York, etc. Co.*, 296 U. S. 463, wherein the Court said:

“* * * The State Court still had control of the property and questions as to the rights of *the parties who were before it, or of those who might come before it*, were legal questions which the court had jurisdiction to decide.” (Emphasis added.)

IV.

District Court Did Not and Was Not Required to Disregard Appellant's Corporate Entity to Support Its Judgment of Dismissal.

District Court did not disregard appellant's corporate entity and District Court was not required to do so in order to support its judgment herein.

That question is covered by the pleadings in State Court action [R. 62-65, 72-75] and at the trial appellee will prove those allegations by an abundance of testimony. If this Court reverses the judgment herein the identical pleadings will be alleged by appellee in an amended answer filed with District Court.

We have no quarrel with the broad general principles referred to by appellant and, in fact, appellee will bring himself within those principles at the trial of this action (in either the State or District Court). However, the judgment of District Court, is fully supported by arguments I, II, and III, *supra*, without the necessity of resolving the fiction prior to a trial on the merits. There is no language contained in the order of District Court which supports appellant's statement, at page 17 of its brief, to the effect that District Court disregarded appellant's corporate entity. On the contrary that order very clearly discloses the reasoning underlying the order and the judgment of dismissal [R. 78-83].

The District Court dismissed the action because it didn't want "to cover the same ground" ((i. e.) *Princess*

Lida v. Thompson, 305 U. S. 456, 465) which is going to be covered by State Court (which first acquired jurisdiction) in another “*in rem*” proceeding involving the same Cadillac automobile.

Conclusion.

The judgment of dismissal should be sustained.

Respectfully submitted,

WATERS, ARDITTO AND WATERS,

By JAMES J. ARDITTO,

Attorneys for Appellee.

